Cornell Law Review

Volume 43
Issue 2 *Winter 1958*

Article 2

Landlords Tenants and Fires Insurer's Right of Subrogation

Milton R. Friedman

LANDLORDS, TENANTS AND FIRES — INSURER'S RIGHT OF SUBROGATION

Milton R. Friedman†

The existence of approximately 2500 fire insurance companies in this country—most of them undoubtedly prosperous institutions—attests to the almost universal realization of the folly of owning improved real estate without insurance against loss by fire and other casualty covered by fire policies. An occasional owner who overlooks the acquisition of insurance is certain to have his memory jogged by the holder of the mortgage on his property.

On the other hand, few tenants do anything about, or are even aware of, the risk they assume as occupiers of somebody else's property. The positions of owner and tenant in this regard are not the same, yet their respective risks are comparable. The uninsured owner risks the loss of his property. The ordinary tenant risks a personal liability for the value of that property if its destruction occurs through his negligence. The owner almost invariably does something about it. The average tenant does not.

The Tenant's Liability

General Mills, Inc. v. Goldman

The tenant has always been under a potential liability for injury to the property. His lease usually requires him to surrender possession on expiration of the term, in good condition, fire excepted. This did not as a rule excuse him from negligent fire[1] and, even if it did, it released him only from his obligation in contract, *i.e.*, the obligation to restore, but not from liability in tort.[2] If it now appears that tenants were careless about their risk, they did not seem to have been punished very much or very often for it. The problem was a landlord-tenant problem, or appeared to be, until about 1949. The right of an insurer to be subrogated to a claim of the insured against a third person had long been established but until then fire insurance companies had rarely made a practice of claiming a right-over against tenants on the basis of subrogation.[3]

Shortly before this a Mr. and Mrs. Goldman and another couple

† See Contributors' Section, Masthead, p. 263, for biographical data.
1 See text at note 18, p. 230 infra.
2 See note 21 infra.
3 See Brewer, "An Inductive Approach to the Liability of the Tenant for Negligence," 31 B.U.L. Rev. 47, 50, 60 n.50 (1951). Recovery was had in F. H. Vahlsing v. Hartford Fire Ins. Co., 108 S.W.2d 947 (Tex. Civ. App. 1937).

bought a small piece of industrial property in Minneapolis for $110,000, on the faith of a lease to General Mills. The tenant was a solid company and the lease promised a good yield. The Goldman's and their friends pooled $30,000—the cash necessary for this investment. Shortly after this purchase an employee of the tenant was a little careless with a hot casting; a fire followed and the factory building was a complete loss. The insurance company paid the Goldman's over $110,000 or a little more than the cost to them of both land and building.

Despite this recovery the Goldmans then sued the tenant in the federal district court for negligence, claiming $342,500. The insurance company intervened to protect its right of subrogation. The result was a judgment against the tenant for $142,500. Of this, $110,000 was made payable to the insurance company as reimbursement for the loss it had paid the Goldmans.

For some reason *General Mills, Inc. v. Goldman* was not reported in the Federal Supplement. As a result, rumors began to circulate about the case and, as sometimes happens, the rumors were worse than the facts.[4]

On appeal, the United States Court of Appeals for the Eighth Circuit reversed the *Goldman* case, two to one.[5] This reversal was on the narrow ground that the lease in question exempted the tenant from liability due to negligent fire.[6] The court assumed that but for this exemption, a fire caused by the tenant's negligence followed by payment to the landlord, would permit the insurer to recover over against the tenant. The problem had now emerged and the result was a shock.

Other cases followed in which insurance companies recovered against tenants.[7] And now the tenant might for practical purposes be regarded as the landlord's insurer (and the insurer's reinsurer) unless the lease adequately exempts the tenant from liability or unless the tenant, and his employees as well, should be free from fault.

The problem is not entirely a tenant's problem. The same rule operates against a landlord. It did so operate in *Western Fire Insurance Co. v. Milner Hotels, Inc.*[8] There the landlord was the operator of a

4 See Brewer, supra note 3.

5 General Mills, Inc. v. Goldman, 184 F.2d 359 (8th Cir. 1950), cert. denied, 340 U.S. 947 (1951), criticized in 12 U. Pitt. L. Rev. 452 (1951).

6 One commentator criticized the case on this ground. 12 U. Pitt. L. Rev. 452, 454 (1951).

7 See, e.g., Winkler v. Appalachian Amusement Co., 238 N.C. 589, 79 S.E.2d 185 (1953); Wichita City Lines v. Puckett, 288 S.W.2d 122 (Tex. Civ. App.), aff'd, —— Tex. ——, 295 S.W.2d 894 (1956); 29 Am. Jur., Insurance 999 (1940); 51 C.J.S., Landlord and Tenant 1162 (1947).

8 Western Fire Ins. Co. v. Milner Hotels, Inc., 232 F.2d 779 (8th Cir. 1956) (despite tenant's covenant to save landlord harmless). Cf. Trinity Universal Ins. Co. v. Pure Oil Co., 136 N.E.2d 279 (Ohio 1955).

hotel who had leased the hotel restaurant to a tenant. A fire started in the hotel proper and spread to the tenant's premises. The tenant's insurer paid the loss and then recovered over against the landlord.

Prevention of Tenant's Liability

Precluding Subrogation

The *Goldman* and subsequent cases pose a substantial and exceedingly practical problem as to the best method of handling this newly discovered risk. It is clear that the risk ought to be covered one way or another by insurance.[9] Fire insurance policies cover negligent as well as nonnegligent fires.[10] In fact, one of the objects of insurance is to protect the insured from loss due to carelessness. Accordingly, the propriety of a person shifting the risk of fires, negligent as well as accidental, to an insurance company is hardly open to question. Inasmuch as subrogation, an end result of such insurance, may shift this risk a second time, this time to a tenant, a party who is not in the business of assuming such a risk, there can be no lack of propriety in the tenant seeking to avoid the consequences of his possible negligence. Whether or not the insurer should get additional premiums for this is a matter largely for the actuaries.

In seeking to preclude subrogation and shift the risk back to insurers, consideration may be given to: (1) including landlord and tenant in the same policy; and (2) obtaining an express waiver of subrogation from the insured.

Combined Policy

Inclusion of the tenant in the landlord's policy solves the tenant's problem. The tenant becomes a party protected by the policy and, accordingly, there may be no right of subrogation against him.[11] Conversely, there is no right of subrogation against the landlord if the landlord is included in the tenant's policy.

---

[9] Liability insurance for the tenant does not appear to be the answer, especially in large apartment houses and other multi-tenant buildings where each tenant seeking protection would be compelled to insure the whole building, not merely his own interest.

[10] Cerny-Pickas & Co. v. C. R. Jahn Co., 7 Ill. 2d 393, 397, 131 N.E.2d 100, 103 (1955), noted in 34 Chi.-Kent L. Rev. 259 (1956), 5 DePaul L. Rev. 305 (1956) and 1956 U. Ill. L. Forum 301; Nash v. American Ins. Co., 188 Iowa 127, 174 N.W. 378 (1919); Todd v. Traders & Mechanics Ins. Co., 230 Mass. 595, 120 N.E. 142 (1918); United States Fire Ins. Co. v. Phil-Mar Corp., 131 N.E.2d 444 (Ohio App.), aff'd, 166 Ohio St. 85, 139 N.E.2d 330 (1956), noted in 26 U. Cin. L. Rev. 328 (1957); 29 Am. Jur., Insurance 778 (1940); Annot., 10 A.L.R. 728 (1921); and see General Mills, Inc. v. Goldman, supra note 5, at 365.

[11] Compare, Palisano v. Bankers & Shippers Ins. Co., 193 Misc. 647, 651, 84 N.Y.S.2d 637, 641 (1948) (noted in 49 Colum. L. Rev. 866 (1949)), aff'd, 276 App. Div. 523, 95 N.Y.S.2d 543 (4th Dep't 1950); 2 Richards, Insurance § 189 (5th ed. 1952).

There is some authority for the position that an express covenant in a lease by a landlord to insure, means to insure for the benefit of both landlord and tenant, on the ground that it would be unnecessary for a landlord to agree with his tenant to insure if the insurance was to be for his sole benefit.[12] There is, however, contra authority on this point[13] and the matter is too important to be left to the hazard of judicial construction; it should be expressly covered in the lease. If combined insurance is to be the tenant's solution, his lawyer should get a clause into the lease reading substantially:

> Throughout the term hereby demised the landlord shall carry fire insurance, with extended coverage endorsement, on the demised premises in solvent and responsible companies authorized to do business in the state of ..... and equal to at least 80% of the insurable value of the premises, such insurance to be in the name of the landlord and tenant as their interests may appear. The tenant shall not be liable for any loss or damage to the demised premises by fire or any other cause within the scope of such fire and extended coverage insurance, is being understood that the landlord shall look solely to the insurer for reimbursement for such loss or damage.

There would be no difficulty in writing insurance to carry out this provision where the premises are in single occupancy or where the tenants are few and their occupation steady. However, in the case of multiple occupancy, as in a large office building with constantly changing tenants, it would not be feasible to write this shifting group into the landlord's policy.[14]

Even where protection through a joint policy is feasible, the method is not without its shortcomings. Due to the joint nature of the policy, either party must contemplate the possibility that some act or omission of the other party will invalidate the policy as to both. Accordingly, it is not advisable for a landlord to accept such a policy uuless the policy effectively provides that no act or omission of the tenant will invalidate the policy as to the landlord.

Precedent for the use of a combined policy exists in the owner-mortgagee situation. There, the holder of a mortgage on improved real estate accepts a fire insurance policy as a matter of course which insures both mortgagor and mortgagee. These policies almost always contain a standard or "union" mortgage clause, which

[12] Fry v. Jordan Auto Co., 224 Miss. 445, 80 So. 2d 53 (1955) (alternate holding). Compare, General Mills, Inc. v. Goldman, supra note 5, at 365; United States Fire Ins. Co. v. Phil-Mar Corp., supra note 10, at 446 (agreement to pay increase in rates).

[13] United States Fire Ins. Co. v. Phil-Mar Corp., supra note 10; 29 Am. Jur., Insurance 1001 (1940).

[14] The fact that the insurance may have to be spread among a number of different companies, if the property is sufficiently valuable, is not prohibitive. This would merely require a little more clerical work in listing the parties.

effects a separation of the parties for some purposes. The policy actually may be regarded for practical purposes as two separate policies. It names the mortgagor as the insured and, to this extent, is a contract of insurance between the mortgagor and the insurance company. The mortgagee endorsement attached to this policy is more than a mere assignment to the mortgagee of a right to the proceeds of insurance. It is treated as a separate contract between the mortgagee and the insurer. Its effect is to insulate the mortgagee from any act or omission of the mortgagor. Suppose, for instance, that the mortgagor-mortgagee policy is in an amount approximating the full insurable value of the property, but that the mortgagor, nevertheless, obtains additional insurance, from another company, which covers him alone. The premises are now over-insured. Whatever effect this may have on the mortgagor's rights, the mortgagee's right of recovery on the first policy is not thereby precluded or reduced. And if the mortgagor should violate some provision of the policy, as by maintaining on the premises inflammable materials or explosives in an amount forbidden by the policy, this, likewise, would not prejudice the mortgagee's right of recovery. Furthermore, if the insurer claims the policy never had a valid inception, because of misrepresentation by the mortgagor in his application, this also is without effect on the mortgagee's rights.[15]

Non-Liability Clause

The insurer's potential right of subrogation may be precluded without writing both landlord and tenant into the same policy. The right of subrogation is derivative and cannot come into existence if there is nothing to derive. The insurer's right of subrogation is derived from the insured[16] (the landlord in most cases here under consideration) and arises only after the insurer has paid the amount of the loss. If the landlord has no claim against the tenant, there is no claim which can pass to the insurance company. Suppose the lease provides that the tenant shall not be liable for damage by fire, even if due to the tenant's fault. In this case there can be no right of subrogation in the landlord's insurer.

Few leases excuse a tenant from liability for fire by language this broad. But tenants, looking for the next best thing, have sought to defend themselves against claims by insurance companies, as subrogees,

[15] See generally, Syracuse Sav. Bank v. Yorkshire Ins. Co. Ltd., 301 N.Y. 403, 408-09, 94 N.E.2d 73, 76-77 (1950) (and authorities collected); 6 Appleman, Insurance Law and Practice § 4164 (1942); 45 C.J.S., Insurance 229, 238, 282, 368 (1947); Annot., 124 A.L.R. 1034, 1038 (1940); Note, 33 Colum. L. Rev. 305 (1933).

[16] United States Fire Ins. Co. v. Phil-Mar Corp., supra note 10.

on the ground that the ordinary surrender clause in a lease absolved them from liability and hence precluded subrogation. It is common for a lease to provide, in substance:

> On or before the expiration of the term hereby granted the tenant will surrender possession of the demised premises in good condition, reasonable wear and tear and damage by fire and the elements excepted.

This clause excuses the tenant from an "obligation to restore" if the fire or other casualty results from no fault of the tenant.[17] But the majority of cases hold that this does not excuse a tenant from negligence and, accordingly, the tenant is liable for damage despite this clause if the damage springs from his negligence.[18] This rule has been criticized on the ground that fires ordinarily spring from negligence in some form[19] and that a construction of a fire clause, which excludes the majority of fires, flouts the understanding as well as the intentions of the parties. The criticism might appear to have some support in the fact that even the professionals, the insurance companies, draw no distinction between negligent and non-negligent fires.[20] Why then should laymen? In the first place, it is a *surrender* clause, in which no word of release appears.[21] When invoking the clause as a defense, tenants argue for an implied construction of an old clause in the face of a new problem. If landlord and tenant alone were involved there would be nothing shocking in rejecting the clause as a basis for putting the loss on the innocent party. It is only when an insurance company is also involved that the result appears grotesque. Subrogation is a windfall to the insurer. In this connection Professor Patterson wrote:

> Subrogation is a windfall to the insurer. It plays no part in rate schedules (or only a minor one), and no reduction is made in insuring interests, such as that of the secured creditor, where the subrogation right will obviously be worth something. Hence, in such a case, no reason appears for extending it. Even as to tortfeasors, it is arguable that since

17 Young v. Leary, 135 N.Y. 569, 578, 32 N.E. 607, 609-10 (1892); Edwards v. Ollen Restaurant Corp., 198 Misc. 853, 857, 98 N.Y.S.2d 815, 820 (N.Y. Munic. Ct.), aff'd, 198 Misc. 858, 103 N.Y.S.2d 512 (Sup. Ct., App. T., 2d Dep't 1950); Basketeria Stores, Inc. v. Shelton, 199 N.C. 746, 155 S.E. 863 (1930); 51 C.J.S., Landlord and Tenant 1102 (1947).

18 Sears, Roebuck & Co., Inc. v. Poling, —— Iowa ——, 81 N.W.2d 462 (1957) (and cases collected); Winkler v. Appalachian Amusement Co., 238 N.C. 589, 79 S.E.2d 185 (1953); 32 Am. Jur., Landlord and Tenant 669 (1941); 51 C.J.S., Landlord and Tenant 1162 (1947).

19 See General Mills, Inc. v. Goldman, supra note 5, at 364; Cerny-Pickas Co. v. C. R. Jahn Co., supra note 10; United States Fire Ins. Co. v. Phil-Mar Corp., supra note 10.

20 See note 10 supra.

21 It has been indicated that a provision in a lease, which excuses the tenant from a covenant to restore after a fire, releases the tenant only from his obligation in contract, i.e., the covenant to restore, but that the tenant is liable to his landlord, nevertheless, in tort by reason of fire resulting from his fault. See the dissenting opinion of Sanborn, J. in General Mills, Inc. v. Goldman, supra note 5, at 370; Slocum v. Natural Products Co., 292 Mass. 455, 198 N.E. 747 (1935); Brewer, supra note 3, at 52 et seq.

> the insurer is paid to take the risk of negligent losses, it should not shift the loss to another.[22]

At any rate, there are recent cases holding that a surrender clause of this type does excuse a tenant from liability for negligent fire.[23] It is interesting to note that in all these cases the real plaintiff was an insurance company claiming against a tenant under a right of subrogation derived from the landlord. These cases, perhaps indicative of a trend, might possibly indicate that the weight of authority is shifting. At any rate the stakes here, perhaps the value of an entire building, are too high to rely on the hazard of construction. If the parties intend an executory release they should express a release. If this release runs to the tenant, it prevents any right of subrogation from vesting in the landlord's insurer.[24]

This would solve the tenant's problem. But with what effect on the landlord's insurance policy? An insured destroys his cause of action on the policy by releasing the wrongdoer, before settlement with the insurer, because the settlement is destructive of the right-over of the insurer.[25] Quaere, if the result is any different if the landlord releases the tenant in advance by including an exemption clause in the lease?[26] In this connection, it should be noted that the right of the insurer is not limited to the equitable doctrine of subrogation. The policy expressly entitles the insurance company to obtain from the insured an assignment of all right of recovery against a third party, to the extent of the in-

---

22 Patterson, Essentials of Insurance Law 122 (1935).

23 General Mills, Inc. v. Goldman, supra note 5; Hardware Mutual Ins. Co. of Minn. v. Snyder, 137 F. Supp. 812 (W.D. Penn. 1956), aff'd, 242 F.2d 64 (3d Cir. 1957), district court decision noted in 17 U. Pitt. L. Rev. 509 (1956); Cerny-Pickas Co. v. C. R. Jahn Co., supra note 10; United States Fire Ins. Co. v. Phil-Mar Corp., supra note 10.

24 See note 17 supra.

25 Universal Credit Co. v. Service Fire Ins. Co., 69 Ga. App. 357, 25 S.E.2d 526 (1943); Hilley v. Blue Ridge Ins. Co., 235 N.C. 544, 70 S.E.2d 570 (1952) (and authorities collected); 6 Appleman, Insurance Law and Practice § 4093 (1942); Vance, Insurance 793 (3d ed. 1951); 29 Am. Jur., Insurance 1005 (1940); and see dissenting opinion in United States Fire Ins. Co. v. Phil-Mar Corp., 166 Ohio St. 85, 92-93, 139 N.E.2d 330, 335 (1956). Generally, see King, "Subrogation Under Contracts Insuring Property," 30 Texas L. Rev. 62, 85 (1951); 42 Va. L. Rev. 588 (1956). An insurer's refusal to pay a valid claim constitutes a waiver of its rights of subrogation, so that its subsequent destruction cannot be asserted as a defense to an action by the insured. Poole v. William Penn Fire Ins. Co., 264 Ala. 62, 84 So. 2d 333 (1955), noted in 9 Vand. L. Rev. 572 (1956). For rights and remedies of insurer paying a loss as against an insured who has released or settled with a third person responsible for the loss, see Annot., 51 A.L.R.2d 697 (1957).

26 Compare generally, Gerlach v. Grain Shippers Mut. Fire Ass'n, 156 Iowa 333, 136 N.W. 691 (1912); Kennedy v. Iowa State Ins. Co., 119 Iowa 29, 91 N.W. 831 (1902); 6 Appleman, Insurance Law and Practice § 4093 (1942); Vance, Insurance 793-94 (3d ed. 1951). A wrongdoer, with knowledge of the insurer's accrued right of subrogation, cannot make a settlement with the insured which will deprive the insurer of its rights. Ocean Accident and Guarantee Corp. v. Hooker Electrochemical Co., 240 N.Y. 37, 147 N.E. 351 (1925).

surer's payment. Quaere, if the landlord who holds such a policy may subsequently nullify this provision by executing a lease which exempts the tenant in advance from liability for a negligently caused fire? Or suppose a landlord has executed and delivered a lease which exempts the tenant, in advance, from such liability? And the landlord thereafter received a fire insurance policy which entitles the insurer to an assignment from the landlord of the right of recovery against a third party. Does this policy receive a valid inception if the insurance company has no knowledge of and, accordingly, has not consented to a clause in the lease which will prevent its right to an assignment from coming into effective existence? The conclusion is that a landlord cannot prudently exempt a tenant in the circumstances without the consent of the insurer.

Waiver of Subrogation

Exculpatory Clauses

Any solution, as to subrogation, which is both effective and safe for both landlord and tenant depends on cooperation from the insurer. An endorsement is now obtainable on fire policies, probably everywhere, which permits the insured to waive in advance its right of recovery against any third person for loss to insured property.[27] On the basis of this, one lease form provides:

> 1. Said Lessee does hereby covenant and agree with said Lessor that it will:
>
> * * * * *
>
> (k) obtain a waiver from any insurance carrier with which Lessee carries fire insurance and/or extended insurance coverage covering Lessee's property and improvements, releasing its subrogation right as against Lessor.
>
> 2. And the Lessor on its part covenants and agrees with the Lessee that it will:
>
> * * * * *
>
> (d) obtain a waiver from any insurance carrier with which Lessor carries fire insurance and/or extended insurance coverage covering Lessor's property and improvements, releasing its subrogation rights as against Lessee.[28]

Waiver of subrogation, alone, does not solve the entire problem. It is no release of any tort or contract claim of the landlord against the tenant or vice versa. These can be handled by personal release. Consider in this connection the following clause:

---

[27] See Mackaman, "Subrogation: A Landlord-Tenant Problem," 4 Drake L. Rev. 79, 81, 83 (1955). The writer is indebted to Mr. Mackaman for helpful suggestions with respect to this paragraph of the text.

[28] Taken from a form used by General Electric Company. The writer is indebted for this form to Robert H. Haggerty, Esq., Attorney, General Electric Company.

> Landlord shall cause each insurance policy carried by Landlord insuring the demised premises against loss by fire and causes covered by standard extended coverage, and Tenant shall cause each insurance policy carried by Tenant and insuring the demised premises and its fixtures and contents against loss by fire and causes covered by standard extended coverage, to be written in a manner so as to provide that the insurance company waives all right of recovery by way of subrogation against Landlord or Tenant in connection with any loss or damage covered by any such policies. Neither party shall be liable to the other for any loss or damage caused by fire or any of the risks enumerated in standard extended coverage insurance provided such insurance was obtainable at the time of such loss or damage. However, if such insurance policies cannot be obtained, or are obtainable only by the payment of an additional premium charge above that charged by companies carrying such insurance without such waiver of subrogation, the party undertaking to carry such insurance shall notify the other party of such fact and such other party shall have a period of ten (10) days after the giving of such notice either to (a) place such insurance in companies which are reasonably acceptable to the other party and will carry such insurance with waiver of such subrogation or (b) agree to pay such additional premium if such policy is obtainable at additional cost (in the case of Tenant, pro rata in proportion of Tenant's space to the square feet of floor space covered by such insurance) and if neither (a) nor (b) is done, this Article shall be null and void for so long as either such insurance cannot be obtained or the party in whose favor a waiver of subrogation is desired shall refuse to pay the additional premium charge.[29]

The second sentence of this clause purports to release both landlord and tenant from personal liability for damage within the scope of the insurance policy. Any such release, however, should not go beyond the scope of the insurance, because release of uninsured injury shifts the loss from wrongdoer to innocent party.

The clause last mentioned should work effectively (1) to the extent that the landlord and tenant carry the insurance thereby contemplated; and (2) that the extent that an exculpatory clause of executory release in a lease is valid.

Release of a tenant presents little problem. An Illinois court once held an executory release of a tenant invalid on the ground that exculpatory clauses are against public policy.[30] But this has been over-ruled and does not represent the Illinois rule.[31] Exculpatory clauses in favor of the tenant have not frequently been before the courts, possibly because there are not enough tenants with sufficient bargaining power to

---

[29] The writer is indebted for this form to Morris J. Helman, Esq., of the New York Bar.

[30] Cerny-Pickas & Co. v. C. R. Jahn Co., 347 Ill. App. 379, 106 N.E.2d 828 (1952). But cf. Cerny-Pickas & Co. v. C. R. Jahn Co., 7 Ill. 2d 393, 131 N.E.2d 100 (1955).

[31] Jackson v. First National Bank, 348 Ill. App. 69, 108 N.E.2d 36, aff'd, 415 Ill. 453, 114 N.E.2d 721 (1953).

get such a clause into a lease. The question usually arises in connection with an exculpatory clause in a landlord's favor. It may be assumed that wherever an exculpatory clause in favor of a landlord would be upheld a clause in favor of the tenant, or both landlord and tenant, would be upheld. Exculpatory clauses in leases in the landlord's favor have been upheld in most states[32] but they are construed strictly against the landlord.[33] In New York, exculpatory clauses in landlord's favor were upheld[34] but have since been invalidated by a statute which strikes only at provisions exempting a landlord.[35] By omitting any reference in the statute to exemption of tenants, the statute leaves unchanged as to tenants New York's pre-statutory rule to the effect that exculpatory clauses are enforceable. A Massachusetts statute also invalidates exculpatory clauses.[36] This too strikes only at landlord's exemption.

Release of a landlord is not as easy as release of a tenant within the framework of the New York and Massachusetts statutes, and wherever the public policy against exculpatory clauses is applied by judicial construction, it is applied with even greater strictness against landlords than against tenants. But presumably a tenant may agree that in case of injury to his property, which is within the scope of his insurance coverage, the primary liability for compensation will rest with the insurer. The liability, if any, of the landlord would thereby be made secondary. Inasmuch as this would place the landlord's liability behind that of an insurance company, the risk of the landlord becomes nominal. Inasmuch as there is no actual release of the landlord there would neither be a violation of the New York or Massachusetts statutes nor of any concept of public policy.

---

32 Ibid.; Wade v. Park View, Inc., 25 N.J. Super. 433, 96 A.2d 450, aff'd, 27 N.J. Super. 469, 99 A.2d 589 (1953) (but see Kuzmiak v. Brookchester, Inc., 33 N.J. Super. 575, 111 A.2d 425 (1955) and authorities collected); Clifton v. Chas. E. Bainbridge Co., Inc., —— Okla. ——, 297 P.2d 398 (1956); 6 Corbin, Contracts § 1472 (1951); Feuerstein and Shestak, "Landlord and Tenant—The Statutory Duty to Repair," 45 Ill. L. Rev. 205, 221-24 (1950); Annot., 175 A.L.R. 8, 83 (1948). In Pennsylvania, the clause is said to be valid, except where public policy is offended. Boyd v. Smith, 372 Pa. 306, 94 A.2d 44 (1953), noted in 15 U. Pitt. L. Rev. 493 (1954) (inapplicable to landlord's violation of fire law affecting multiple dwelling). In Georgia, the clause is applicable to "simple negligence" but not to "wanton and willful conduct." Brady v. Glosson, 87 Ga. App. 476, 74 S.E.2d 253 (1953); Plaza Hotel Co. v. Fine Prod. Corp., 87 Ga. App. 460, 74 S.E.2d 372 (1953). For the rule in the District of Columbia, see Rishty v. R. & S. Properties, Inc., 101 A.2d 254 (D.C. Mun. App. 1953). Compare Sears, Roebuck & Co., Inc. v. Poling, —— Iowa ——, ——, 81 N.W.2d 462, 465 (1957).

33 Fields v City of Oakland, 137 Cal. App. 2d 602, 608-09, 291 P.2d 145, 149 (1955); Freddi-Gail, Inc. v. Royal Holding Corp., 34 N.J. Super. 142, 111 A.2d 636 (1955); Kessler v. The Ansonia, 253 N.Y. 453, 171 N.E. 704 (1930); 6 Williston, Contracts § 1751c (Williston & Thompson rev. ed. 1936); Annot., 175 A.L.R. 8, 89 (1948).

34 Kirshenbaum v. General Outdoor Adv. Co., 258 N.Y. 489, 180 N.E. 245, 84 A.L.R. 645 (1932). The clause is set forth in the dissenting opinion.

35 N.Y. Real Prop. Law § 234.

36 Mass. Ann. Laws c. 186, § 15 (1955).

CONCLUSION

The problem with which we are concerned is predicated in the main upon the possibility of negligence by either landlord or tenant or some party for which either is legally responsible. But liability without fault may exist where a covenant of indemnity is involved. It is not uncommon for a lease, particularly a long-term net lease, to contain an indemnity of the landlord by the tenant of all loss, damage or liability arising from the use or operation of the demised premises. This has been held to give a landlord's insurer, who paid the loss, a right-over against the tenant regardless of the tenant's negligence.[37] A tenant's lawyer who spots a broad indemnity clause of this character in a proposed lease should try to qualify this clause by adding language which might read:

> The tenant shall be relieved and discharged of and from the liability assumed by virtue of this indemnity to the extent that the landlord shall have enforceable insurance with respect to the matter in question.

There is little reason for a landlord to object to this qualification, to the extent that it excuses the tenant from a potential liability whose basis is entirely contractual and which would come into existence without fault on the tenant's part. In these circumstances the indemnity is but a gift to the landlord's insurer. The gift may be withheld without prejudice to the landlord.

---

[37] Hartford Fire Insurance Co. v. Chicago Tunnel Terminal Co., 12 Ill. App. 2d 539, 139 N.E.2d 770 (1956); King, "Subrogation Under Contracts Insuring Property," 30 Texas L. Rev. 62 (1951); 46 C.J.S., Insurance § 1209(b) (1947); and see F. H. Vahlsing v. Hartford Fire Ins. Co., 108 S.W.2d 947 (Tex. Civ. App. 1937).